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COMPARATIVE NEGLIGENCE: THE PENNSYLVANIA
PROPOSAL.

THOMAS J. O'TOOLE †

Introduction.

MORE THAN two score years ago Jeremiah Smith predicted that the doctrine of contributory negligence would disappear from the law.¹ The early workmen's compensation acts and employer liability statutes appeared to him to be the forerunners of a general movement to abolish a harsh and absolute defense which he viewed as already decadent. Prophetic he was for all but his own land. Though abandoned in the other common-law countries, the doctrine of contributory negligence survives in the overwhelming majority of American states.² Commentators and writers are virtually unanimous in calling for the adoption of comparative negligence to reduce but not prevent plaintiff's recovery in cases in which he has negligently contributed to his own loss;³ but the movement toward this change, boldly started by Wisconsin in 1931,⁴ has advanced at a most limited pace. This lag contrasts sharply with the celerity with which other changes have progressed in the field of negligence law,⁵ and suggests some underlying difficulties not adequately explored in the voluminous attacks upon *Butterfield v. Forrester*⁶ and its descendants.

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1. Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 240 (1914).

2. Bress, *Comparative Negligence*, 43 A.B.A.J., 127, 128 (1957). The only broadly applicable American statutes are found in five states. ARK. STAT. ANN. § 27-1742.1 (Supp. 1955); MISS. CODE ANN. § 1454 (1942); NEB. REV. STAT. § 25-1151 (1956); S.D. CODE § 47.0304-1 (Supp. 1952); WIS. STAT. § 331.045 (1953). LA. CIV. CODE ANN. art. 2323 (West 1952) calls for apportionment but has been ignored. Some states have statutes of limited applicability. See *Loftin v. Nolin*, 86 So.2d 161 (Fla. 1956).

3. MORRIS, TORTS 215 (1953); PROSSER, TORTS 283-299 (2d ed. 1955). Among the leading articles are Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289; Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950).

4. WIS. STAT. § 331.045 (Supp. 1953).

5. *E.g.*, recovery for pre-natal injuries. In a decade the rule of *Dietrich v. Northampton*, 138 Mass. 14 (1884), which had been virtually unchallenged in the case law, became a minority view. See Ramsey, *Liability for Prenatal Injuries*, 1956 INS. L. J. 151.

6. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809).

It would be unrealistic to ignore the fact that proposals to substitute a comparative negligence rule for the contributory negligence rule excite powerful interest groups. Insurers and their lawyers oppose such a change and fight actively against all such proposals.⁷ On the other hand the National Association of Claimants' Compensation Attorneys has entered the lists and campaigned vigorously for the comparative negligence doctrine.⁸ The bar generally and the courts in particular are not strong defenders of the underlying policy or the practical fruits of contributory negligence as a total defense. It can fairly be said that in the entire amorphous body of tort law there is no rule which has been more widely criticized. Its condemnation is found in the fabric of the law itself: by one device or another all of our courts have attempted to minimize the harsh effect of the rule or to circumvent it *but not to abolish it*.

An amazing variety of techniques have been employed to permit recovery by the plaintiff who has been somewhat negligent. The most widely applied formula is the last clear chance doctrine,⁹ which permits the court to declare, in effect, that only the defendant's negligence was causally connected with the damage. The same concept appears in a different verbal disguise in some states which expressly reject the last clear chance formula, but achieve the same result by declaring the plaintiff's negligence a "condition" rather than a "cause" of his damage.¹⁰ Despite the virtual impossibility of administering a system of liability based upon the classification of negligence into various degrees, wide acceptance has been won for the proposition that the defense of contributory negligence shall not be available to a defendant whose own misconduct has been wanton.¹¹

Although hardly demonstrable, the principal escape from the harshness of the contributory negligence rule has been the notorious tendency of juries to refuse to find contributory negligence and, on not infrequent occasion, to return verdicts which evidence the informal application of comparative negligence. Some judges have spoken frankly of this tendency. In Pennsylvania there has developed a doctrinally strange official, though limited, approval of such failure to observe the rule of law. It has been held, and, now appears well established,¹² that

7. See Insurance Advocate, July 2, 1955, pp. 4, 13.

8. See Pound, *Comparative Negligence*, 13 NACCA L.J. 195 (1954).

9. *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

10. *Cannon v. Bassett*, 264 Mass. 383, 162 N.E. 772 (1928).

11. *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943).

12. *Carpenelli v. Scranton Bus Co.*, 350 Pa. 184, 38 A.2d 44 (1944). See *Patterson v. Palley Mfg. Co.*, 360 Pa. 259, 268, 61 A.2d 861, 866 (1948).

plaintiff's motion for a new trial, based on inadequacy of the damages may be denied on the ground that the record reveals evidence of contributory negligence which may have been used by the jury (however improperly) in returning an otherwise unjustifiably small verdict. This appears completely incompatible with a continued insistence that proof of contributory negligence is an absolute defense.¹³

If Pennsylvania has already reached a half-way house to comparative negligence, the opportunity for full acceptance of that rule is now at hand. The state legislature is currently considering a bill¹⁴ which would abolish the common-law defense and substitute a rule of apportionment of damages. Considerable interest in the bill has already been aroused, and various bar associations have undertaken a poll to determine the views of their members.¹⁵ The bill itself is fairly representative of the run of comparative negligence proposals which constantly flow into state legislative hoppers throughout the country. Its principal provisions are copied from a proposal made by Dean Prosser which has already been enacted in Arkansas.¹⁶ A critical examination of the bill provides a vehicle for setting forth our observations on comparative negligence and on the problems of drafting a satisfactory statute on this topic, as well as on the specific proposals now being considered in Pennsylvania.

13. Numerous other methods are available to alleviate the harsh effect of the doctrine of comparative negligence. In the English cases there developed a suggestion (which has perhaps survived the adoption of comparative negligence) that an act or omission which might be negligent vis-à-vis a third party might not be negligent vis-à-vis oneself even if it creates the same danger. *Flower v. Ebbw Vale Steel, Iron and Coal Co. Ltd.* [1934] 2 K.B. 132, 140; *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152. See *Stavely Iron & Chemical Co., Ltd. v. Jones*, 2 Weekly L.R. 479 (H.L. 1956).

14. House Bill 667, Session of 1955 (as amended on third reading in House of Representatives). The bill was held over for consideration in 1956 and 1957. The text is as follows:

"Section 1 (a) In all actions hereafter brought for death or personal injuries or damage to property caused by unlawful violence or negligence the fact that the person injured or killed or the parties suing or the owner of the property or the person having control over the property may have been guilty of contributory negligence shall not bar a recovery.

"(b) In an action the damages to be recovered shall be diminished in proportion to the amount of contributory negligence if any attributable to any such person.

"(c) The determination of the proportion of contributory negligence if any in any action shall be a matter entirely for the jury or in cases tried without jury for the trial judge.

"(d) If having regard to all the circumstances of any case in which there has been contributory negligence the fact finding body shall not find it possible to determine the respective degrees of faults between the plaintiffs and the defendants they shall be deemed to be equally at fault and the damages shall be diminished by one-half."

15. An adverse vote resulted at the 61st Annual Meeting of the Pennsylvania Bar Association, at Pittsburgh, Jan. 30, 1957. The Committee on Civil Law had previously favored the proposal by a vote of 7 to 6. 28 PEN. B.A.Q. 2, 62-65 (1957). The Philadelphia Bar Association favored the measure 225 to 217. *The Legal Intelligencer*, Jan. 18, 1957, p. 1.

16. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 508 (1953); Ark. Acts 1955, No. 191.

I.

TO WHAT CASES DOES THE BILL APPLY?

Early doubts and hesitations concerning the constitutionality of prospective changes in the defense of contributory negligence have long ago disappeared, but retroactive changes remain questionable.¹⁷ The proposed measure purports to apply to "all actions hereafter brought."¹⁸ The conclusion seems inescapable that the measure is intended to apply to causes of action which arose before enactment if the suit is commenced thereafter. Nothing in the Pennsylvania Constitution expressly forbids such retroactive legislation. It has been consistently held, however, that the repeal of a statute under which a cause of action arose cannot destroy the cause of action.¹⁹ The foundation for this result is the constitutional provision which guarantees that every man shall have a remedy for an injury.²⁰ Defenses against claims have been treated as being similarly vested and beyond the reach of the legislature.²¹ It has been held that the legislative repeal of a statutory exemption from liability cannot affect the availability of the exemption as a complete defense in litigation arising from an event which antedated the repeal. The court said:

"A legal exemption from a demand made by another is a vested right which the legislature may not interfere with. Even an expressed purpose that an act shall have such retroactive effect is without avail."²²

A statutory introduction of the comparative negligence rule would destroy the complete defense which contributory negligence provides and give the defendant in substitution a right to have the damages reduced. This appears almost equally offensive to the constitutional protection afforded vested causes of action and vested defenses.

We cannot escape the conclusion that the proposed application of comparative negligence to pre-existing causes of action would be unconstitutional. While a heroic interpretation might avoid retro-

17. In Wisconsin this issue was avoided by holding the comparative negligence statute prospective in its operation. *Peter v. Milwaukee E.R. & L. Co.*, 217 Wis. 481, 486, 259 N.W. 724, 727 (1935).

18. See note 14 *supra*, § 1.

19. *Rebel v. Standard Sanitary Mfg. Co.*, 340 Pa. 313, 16 A.2d 534 (1940) (semble).

20. "All Courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Pa. Const. art. I, § 11 (1874).

21. *Kay v. Pennsylvania R.R.*, 65 Pa. 269, 277 (1870).

22. *Lewis v. Pennsylvania R.R.*, 220 Pa. 317, 323, 69 Atl. 821 (1908).

activity,²³ the bill under consideration leaves little room for such a result. It is not suggested that the measure would fall, but its application to existing causes would be void. The retroactive feature of the bill is entirely unnecessary to the rapid achievement of the desired alteration. The language should be changed from "in all actions hereafter brought" to "in all actions for death or personal injuries or damage to property hereafter caused."

II.

WHOSE NEGLIGENCE IS RELEVANT?

Sections 1(a) and 1(b) of the proposed act,²⁴ when read together, call for a proportional reduction of damages in all actions for death or personal injuries or damage to property whenever the person killed or injured, or the claimants, or the person owning or controlling the property has been guilty of contributory negligence. Apparently the only purpose of the act is to reduce contributory negligence from a defense *in toto* to a defense *pro tanto*. But as presently framed the bill explicitly produces a wider effect, because it commands a reduction of damages upon proof of negligence of some persons who may not be claimants and whose negligence under present law would not in all instances prevent recovery by the claimant. For example, apportionment of damages would be required in suits for damage to bailed property caused by the concurring negligence of the owner of the property and the defendant, or of the bailee and the defendant, regardless of the identity (bailor or bailee) of the plaintiff. The effect is to impute to a bailor the negligence of a bailee and to the bailee the negligence of the bailor. The question of doing this has been much debated in the past,²⁵ but the enormous weight of authority has swung strongly against imputing the negligence when property under a bailment has been damaged by a third party. The arguments against imputed negligence which have been considered sufficiently weighty when contributory negligence is a complete bar to recovery lose none of their force when contributory negligence reduces the damages recoverable. Whatever view is taken on imputed negligence, the issue ought not to be settled casually in a statute ostensibly designed for a quite different purpose.

23. "No law shall be construed to be retroactive unless clearly and manifestly so intended by the Legislature." PA. STAT. ANN. tit. 46, § 556 (Supp. 1954).

24. See note 14 *supra*.

25. For a full discussion see Nash v. Lang, 268 Mass. 407, 107 N.E. 762 (1929). See RESTATEMENT, TORTS, § 489 (1934).

The same language in the bill also raises a question concerning possible apportionment in death cases where one or more of the next of kin have been negligent together with the defendant in causing the death of the decedent. The proper treatment of such a case is itself not an easy question²⁶ and should not be prejudiced by statutory provisions which are really intended to deal with an entirely different problem.

Both of these potential difficulties can easily be avoided. A detailed enumeration of the persons whose contributory negligence will serve to reduce the amount of damages recoverable by the claimant is neither necessary nor desirable. It would be enough for the statute to declare, as in Wisconsin, that:

"contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property . . . but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributed to the person recovering."²⁷

An equally satisfactory formulation can be found in the first Canadian provincial comparative negligence act which calls for apportionment in cases described as follows:

"In any action or counter-claim for damages which is founded upon fault or negligence if a plea of contributory fault or negligence shall be found to have been established . . ."²⁸

In this clause the reference to "a plea of contributory fault or negligence shall be found to have been established" serves to incorporate the pre-existing law concerning the question whose fault is attributable to the plaintiff.

The act calls for a reduction "in proportion to the amount of contributory negligence,"²⁹ and a proportion requires a comparison. With what will the plaintiff's negligence be compared? One of the earliest difficulties with the Wisconsin statute involved exactly this kind of problem. If the plaintiff were twenty per cent negligent and the defendant eighty per cent, should the plaintiff recover eighty one-hundredths, or twenty eightieths, or sixty per cent (eighty minus twenty) of his full damages? The Wisconsin Supreme Court decided that the first formula

26. Compare *Peoples v. Seamon*, 249 Ala. 284, 31 So.2d 88 (1947), with *McKay v. Syracuse Rapid Transit Co.*, 208 N.Y. 359, 101 N.E. 885 (1913).

27. WIS. STAT. § 331.045 (Supp. 1953).

28. ONTARIO STAT. c. 32, § 2 (1924). The present Ontario statute on the subject is The Negligence Act, REV. STAT. ONTARIO c. 252 (1950). See UNIFORM CONTRIBUTORY NEGLIGENCE ACT (Canada 1924).

29. See note 14 *supra* § 1(b).

was the correct one.³⁰ Since that time it has generally been accepted that comparative negligence statutes are designed to reduce the plaintiff's recovery by the proportion which his negligence (or negligence attributable to him) bears to the total negligence in the case.

It is this question of *total negligence in the case* which leaves considerable doubt. Before making the apportionment computation we must know not only whose negligence will be used to reduce the claimant's recovery, but we must also know whose negligence will be considered when the percentage of diminution of damages is being determined. In Wisconsin only the negligence of the *parties* to the case is considered.³¹ If there is a person who is not joined but whose negligence contributed to the damage, the failure to consider his negligence produces a greater diminution of plaintiff's recovery than would occur if the third party's negligence were considered. If the plaintiff were one part negligent and the defendant three parts negligent, and a third person two parts negligent, plaintiff's recovery would be reduced not by one-sixth but one-fourth because *only his and the defendant's negligence* is considered.

The language of the proposed bill does shed some light on whether the same result would follow if this measure is enacted. Although section 1(b) calls for a diminution of recovery ". . . in proportion to the amount of contributory negligence if any . . ." such a phrase does not help resolve the problem we are now considering but admits of computing the proportion by weighing the contributory negligence either against all the negligence which was causal of the damage or against all the negligence of parties before the court. And section 1(c), which leaves the determination of the proportion of contributory negligence to the jury, is equally obscure. However, section 1(d), which was designed to operate when the fact-finder cannot determine the proportion and ordains a fifty per cent reduction in damages, speaks of "the respective degrees of fault between the plaintiffs and the defendants . . ." The clear implication is that the proportion contemplated in the statute is not determined with reference to the negligence of persons who are not parties to the litigation.

It has been said that an opposite result would be reached under the Arkansas Comparative Negligence Act which is identical with the Pennsylvania bill in all respects material to this problem.³² Modification

30. *Cameron v. Union Automobile Ins. Co.*, 210 Wis. 659, 246 N.W. 420 (1933).

31. But it has been urged that the Wisconsin statute be amended to change this, and include the negligence of other persons who may be protected from liability by some other rule. Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289, 306-7.

32. Dobbs, *Act 191: Comparative Negligence*, 9 ARK. L. REV. 357, 362-364 (1955).

of the Wisconsin statute to achieve this opposite result has also been urged. The justification for such a change is not readily apparent. In some cases the third party will be one who could not have been successfully sued because of sovereign immunity, family immunity, a variant period of limitations, jurisdictional obstacles, or other reasons. To allow the plaintiff to compute the percentage reduction in damages by adding to the defendant's negligence the fault of a party who cannot be reached would create a disproportion in loss-bearing, contrary to the basic policy of comparative negligence. Here, as at other points, the problem of comparative negligence parallels problems of contribution among joint tortfeasors, and dissimilar treatment of cases under two headings can only result in a partial frustration of fundamental aims.

A further question concerns the interrelation between fault and causation. Though this issue is seldom explored in the cases, the comparative negligence statutes do not declare whether the proportions of fault shall be set with reference to *all the fault* of the parties or to only *that fault which causes damage*. Prosser has said ". . . there seems to be little doubt that, once causation is found, the apportionment must be made on the basis of comparative fault rather than comparative contribution."³³ Yet other writers assert that only the comparative contribution is relevant, and any portion of fault which is not causally connected with the damage is irrelevant.³⁴ Case law is no more than suggestive of the problem but tends toward the latter view.³⁵

III.

WILL THE RESULTS BE EQUITABLE?

Certainly the unfairness of the contributory negligence rule is easy to demonstrate. To bar all recovery by a plaintiff who has suffered a loss occasioned in part by his own fault and in part by the fault of the defendant, at least where the latter's fault was disproportionately great, can be justified only by invoking pseudo-moralistic slogans. Most of the arguments advanced in support of the doctrine of comparative negligence deal only with the defects of the present rule and assume that an apportionment of damages can be achieved equitably under a

33. Prosser, *Comparative Negligence*, 51 MICH. L. REV., 465, 481 (1953).

34. Campbell, *Wisconsin Comparative Negligence Law*, 7 WIS. L. REV. 222, 231 (1932).

35. See *Baird v. Harrington*, 202 Miss. 112, 30 So.2d 82 (1947). In *England v. National Coal Board*, [1953] 1 Q.B. 724, the Court of Appeals found the plaintiff's fault not causal of his loss. The House of Lords reversed, but reduced the trial court's finding of 50% negligence on the part of the plaintiff to 25%. *National Coal Board v. England*, [1954] A.C. 403. Query whether the diminution reflected a finding of less fault or a finding of less causal connection?

comparative negligence statute. We have already seen that the problem of apportionment is simple only superficially. While it is often said that we need not be concerned over the administration of comparative negligence rules because there has been a long and successful experience in the use of such a doctrine,³⁶ this experience has been almost exclusively either with cases that are intrinsically uncomplicated or before courts which do not use jury trials. Particularly with a jury, the ease of administering a comparative negligence rule starts to dissolve whenever (a) more than one party suffers damage or (b) more than two parties have been negligent in causing a loss suffered by one or more parties. The principal experience with comparative negligence cases in this country has been under the Federal Employers' Liability Act.³⁷ Almost invariably those cases have involved loss only by the plaintiff and negligence only by the defendant or negligence by the plaintiff and defendant. The principal experience in other countries, including the British Commonwealth,³⁸ has been in maritime cases or in other non-jury trials. Such experience is hardly a fair guide for the American setting.

Cases in which both plaintiff and defendant have suffered damage and both have been negligent jeopardize the fair allocation of losses whenever the proportion of fault and the proportion of damage are inverse to each other. The unwillingness to allow a net recovery to the party whose negligence predominated (a reluctance which is a formal rule in the Wisconsin statute) can be expected to appear in any case in which the jury is called upon to give a larger recovery to the party whose negligence was greater than is awarded to the party whose negligence was less.

The multiple-party suit also disrupts the pursuit of fairness in the allocation of tort losses. In each of our states the rules relating to joint tortfeasors make a mathematically correct apportionment impossible. Where contribution among joint tortfeasors has not yet been introduced, the defendant is subject, at the whim of the plaintiff, to having the negligence of a third party ignored. The comparative negligence rule should provide an incentive to the plaintiff to join additional defendants for the purpose of reducing his own proportion of contributory negligence. But the damages awarded against each defendant will be in the full amount proved by the plaintiff diminished only by his own percentage of negligence. The relative degree of

36. Bress, *Comparative Negligence*, 43 A.B.A.J. 127 (1957).

37. 45 U.S.C. § 53 (1952).

38. The English statute is The Law Reform (Married Women and Tortfeasors) Act, 1935 24 & 25 GEO. 5, c. 30, § 6.

fault as among joint defendants will have no effect on the relative amount of the damages assessed against each or on the relative amount of payment sought by the plaintiff. Each remains liable for the same quantum and it may be collected from one or the other solely or in such proportion as the plaintiff selects.

Even where contribution among joint-tortfeasors is an available remedy, the contribution is always *per capita* and never *per culpa*. The Uniform Act³⁹ and the various state versions⁴⁰ providing for contributions all distribute the damage by aliquot parts without reference to comparative fault.

Obviously the multi-party case, calling for loss distributions on the basis of two different and conflicting principles, presents a challenge which is essentially insoluble. It is idle to suggest that this problem can be solved by eliminating jury trials, not only because such a development cannot reasonably be expected in the foreseeable future, but more fundamentally because no judicial machinery can ever reconcile two different systems of loss allocation for simultaneous application.

The most that can be said (and it is the argument usually advanced) is that multiple party cases under comparative negligence statutes have been remarkably rare.⁴¹ The rareness is indeed remarkable in view of the substantial number of cases under joint tortfeasor statutes. Each of these classes of cases is one which would produce a dilemma under the proposed statutes.

Two solutions (apart from retaining the present contributory negligence rule) suggest themselves. Either the joint tortfeasors statutes could be modified to provide for contribution in proportion to fault, or the comparative negligence proposal could be modified to provide for aliquot division of damages. The former solution is the one adopted in England and in Canada.⁴² However, as previously indicated, virtually all tort cases in those jurisdictions are tried without a jury. Certainly a jury could make a division of damages according to aliquot shares, but could it be relied upon to allocate damages according to respective degrees of fault in multi-party situations?⁴³

As a practical matter there are serious limitations on the possibility of achieving mathematical fairness in the allocation of accidental losses. It need only be suggested that the measurement of the damages in

39. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (withdrawn by the Commissioners for restudy and revision).

40. E.g., N.J. STAT. ANN. §§ 2A: 53A-1 to 53A-5 (1952).

41. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 507 (1953).

42. See statutes cited in notes 28 and 37 *supra*.

43. See Campbell, *Wisconsin's Comparative Negligence Law*, 7 WIS. L. REV. 222, 242-246 (1932).

tort cases, particularly where there has been personal injury, is subject only to a "rough sense of justice."

Any discussion of tort principles in the United States relating to the measurement of damages is unrealistic unless it also includes a frank recognition of the prevalence of contingent fee arrangements in this field of litigation. When we justify the mathematical fairness of comparative negligence by computing the amount of damages a party has paid or received together with the amount of net loss he has borne himself, we err by a substantial margin in failing to deduct from his jury award the share which will go to his lawyer.⁴⁴ Substituting the rule of comparative negligence for the common-law doctrine does not of course introduce this feature; but the presence of this feature in our tort litigation makes the quest for proper apportionment of losses a most uncertain business.

IV.

WHAT OTHER POLICIES ARE PROMOTED?

Any far-reaching changes in negligence law should not be made without considering the impact which the change will have on the prevalent evil of congested dockets. At least in the automobile tort field, pressures for drastic changes are increasing. Would the introduction of comparative negligence have any effect on the volume of litigation? No reliable study of this question appears to have been made. Proponents of comparative negligence quote their brothers from Wisconsin, Nebraska, and other states which have tried the experiment and who testify that the abandonment of the common-law rule facilitates settlements. Defendants' counsel readily find rebutting witnesses from the same jurisdictions. A careful and detailed study of this problem would be valuable even if it showed only that the change in legal rules had an indifferent effect on the percentage of negligence claims settled out of court. Until such a study is made we can have no confidence in any claims concerning the relationship between adoption of the rule of comparative negligence and ease of settling cases.

Prominent in current tort policy arguments is the notion that rules of liability ought to be framed to put the loss on the best risk-spreader. Some of the leading proponents of this point of view have entered their opposition to comparative negligence.⁴⁵ The reasoning

44. The prevalence of contingent fee agreements in tort cases has an important relevance to a number of other issues affecting tort damages. To say nothing of the "more adequate award," an adequate award must leave room for the contingent fee although the jury is not supposed to include this item in the damages. Contingent fees also provide an important reason why juries should not be instructed to adjust damages in the light of their exemption from income taxes.

45. HARPER & JAMES, TORTS, § 22.11 (1956). See also James, *Contribution Among Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

upon which they rely is that liability insurance is fairly prevalent and, under current practice, there is a strong tendency to permit the plaintiff to escape the supposed fatal effect of contributory negligence. As a consequence, all the damage is charged to the defendant who (it is confidently hoped) will be covered by insurance. Comparative negligence changes this situation by requiring the plaintiff to bear a proportion of the loss (if he has been negligent) and this portion is much less likely to be covered by insurance than is the defendant's portion. Even if the propriety of the policy were conceded, the argument stands or falls on the soundness of its two premises: (1) that liability insurance is more common than insurance for one's personal losses, and, indeed, that it is quite prevalent; and (2) that for the most part negligent plaintiffs are not actually being denied the right to recover. The first premise may be sound enough in auto tort cases; but any current volume of reports is proof of the substantial exaggeration upon which the second premise is based. Perhaps it may fairly be observed that if comparative negligence promises to reduce the volume of liability borne through insurance this is an item of learning which the insurance companies do not seem to have acquired.

Deeper policy issues are sometimes said to be at stake. The President of the American Bar Association has suggested that the adoption of the rule of comparative negligence ". . . could very well take us one step closer to the doctrine of liability without fault."⁴⁶ On the other hand, the proposed change has been urged as representing a refinement and reinforcement of the principle of liability for fault.⁴⁷

In its essential quality, comparative negligence reaffirms the fault principle; in its practical operation it enhances the claimant's chances of recovering. There is nothing necessarily inconsistent between support of comparative negligence and rejection of strict liability. It is possible, however, that comparative negligence will create further strains on judicial machinery and provide added impetus to the embryonic efforts to change radically the allocation of accidental losses, particularly in the automobile cases. Such strains have not been prominently evident in the pioneer states which follow comparative negligence, but there have been numerous suggestions of difficulties and a curious reluctance to clarify the operating principles.⁴⁸

46. Maxwell, Address to Pennsylvania Bar Association, Annual Meeting, Jan. 30, 1957, *The Legal Intelligencer*, Feb. 5, 1957, pp.1, 6.

47. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 *LAW & CONTEMP. PROB.* 467 (1936).

48. Prosser writes of the excessive number of appeals on the issue of damages, and the dismal reading which the appellate decisions afford, leaving few clues concerning the

V.

IS AN ALTERNATIVE AVAILABLE?

Enough has been said to indicate that in many cases the proposed allocation of damages will be equitable only accidentally if at all. This critique was intended to lay the foundation for the sympathetic consideration of an alternative method of allocation which, on its face, is only a rule of thumb and not a guide to perfect equity, but which avoids many of the difficulties engendered by the comparative negligence rule. The alternative to which we refer is the time-honored *judicium rusticum* which calls for a division of damages not according to percentage of fault, but equally among all the negligent parties.⁴⁹

The administrative convenience of such a rule hardly needs to be urged. The difficulty of determining percentages of negligence, the need of special verdicts, the problem of scope of judicial review—all these are avoided. Yet it is submitted, substantial justice is achieved.

Under the common-law rule with its modifications and with the jury system, *all* of the loss is being cast on one party or another. Comparative negligence seeks a more equitable solution but introduces complexities which surpass the capacity of our legal machinery. A division of damages would do no more than approach substantial fairness, but would do so simply and surely. The simplicity of the rule would promote predictability of outcome in litigation, thus encouraging settlement without trial. At least until we are prepared to put contribution among joint tortfeasors on a comparative fault basis, division of damages is the only possible reform in multiple party cases.

actual operation of the rule of comparative negligence. Prosser, *Comparative Negligence* MICH. L. REV. 482-3 (1953). See also Bress, *Comparative Negligence*, 43 A.B.A.J. 127, 129 (1957) on the indisposition to discuss the apportionment formula. One would expect the damages to run lower under comparative negligence, but Belli reports that under the Federal Employer Liability Act they run higher than at common law and he attempts to give a psycho-sociological explanation. BELL, TRIAL AND TORT TRENDS xxvii (Belli ed. 1956).

49. "As a rule of thumb, which frankly renounced the pretence of being anything more, it was long found tolerable by the majority of those whom it concerned" POLLOCK, TORTS 366 (15th ed., Landon 1951). See Sprague, *Divided Damages*, 6 N.Y.U. L. REV. 15 (1928). For a criticism see Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 226-238 (1950).